93-587

No. _____

SUPREME COURT, U.S.
AUG 24 1993
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1993

JAMES RICHARD SCARCE, ***Petitioner,***

v.

UNITED STATES, ***Respondent.***

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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August 23, 1993

QUESTIONS PRESENTED

Introduction. The Petitioner, a research sociologist and Ph.D. candidate, has been conducting ethnographic research of environmental and animal rights groups and is known to be on personal terms with a target of a grand jury investigating animal rights vandalism. Although fully cooperative regarding his personal relationships, Scarce asserted a qualified privilege to refuse answering specific questions regarding the identities of his confidential research subjects and the circumstances and content of their interviews. Scarce has been held in coercive contempt for over 100 days.

The following questions are presented:

1. Whether a non–percipient witness has a qualified privilege under the First Amendment against compelled disclosure of confidential research sources.

    a. Whether a research sociologist is functionally equivalent to a journalist for purposes of the speech–press clause of the First Amendment.

    b. If so, whether journalists who are not witnesses to the crimes under investigation have a qualified privilege to refuse disclosing their confidential sources.

2. Whether a non-percipient witness has a qualified privilege under the common law provisions of Federal Rules of Evidence 501 against compelled disclosure of his confidential research sources.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1993

JAMES RICHARD SCARCE, ***Petitioner,***

v.

UNITED STATES, ***Respondent***

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner James Richard Scarce[1] respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in these proceedings on May 6, 1993.

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[1] The caption identifies all parties to this appeal. Two amici appeared below: American Sociological Association and American Civil Liberties Union.

OPINIONS BELOW

The decision of the Court of Appeals for the Ninth Circuit is unreported. The Ninth Circuit stated that a written opinion would be forthcoming. To date, no opinion has issued. The decision is reprinted in the Appendix, tab A1.

The memorandum decisions of the United States District Court for the Eastern District of Washington (Nielsen, J.) have not been reported. They are reprinted in the Appendix, tabs A2 and A3.

JURISDICTION

Jurisdiction to hear this petition for certiorari arises from the decision by the Ninth Circuit, filed without opinion on May 6, 1993, which denied Scarce's appeal under the Recalcitrant Witness Statute. 28 U.S.C. § 1826.

The filing is timely under 28 U.S.C. Section 2101(c) and pursuant to the extension of time granted on August 3, 1993, by Justice O'Connor, sitting as designated Circuit Justice.

The decision is reviewable under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS & STATUTES INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT 1

> Congress shall make no law . . . abridging the freedom of speech, or of the press.

FEDERAL RULES OF EVIDENCE, RULE 501

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts fthe United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or poitical subdivision thereof shall be determined in accordance with State law.

RECALCITRANT WITNESS STATUTE — 28 U.S.C. § 1826

> (a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of —
>
> (1) the court proceeding, or

(2) the term of the grand jury, including extensions,

before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

(b) No person confined pursuant to subsection (a) of this section shall be admitted to bail pending the determination of an appeal taken by him from the order for his confinement if it appears that the appeal is frivolous or taken for dealy. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal. . . .

STATEMENT OF THE CASE

The petitioner, James Richard Scarce, is published author and Ph.D. candidate in the Department of Sociology at Washington State University, Pullman, Washington (WSU). The petitioner has been incarcerated 102 days under an order of civil contempt following his refusal to disclose to a federal grand jury the circumstances of confidential interviews.

Non-Percipient Witness. Scarce is not an eyewitness to any crime, but has published scholarly ethnographic studies regarding members of the Animal Liberation Front, the organization suspected of responsibility for recent vandalism against animal research facilities at WSU and elsewhere. Scarce's ethnographic study of radical ecological groups, *Eco–Warriors: Understanding the Radical Environmental Movement* (Nobel, 1990), is recognized internationally.[2]

The government is seeking information that Scarce obtained from research subjects solely by virtue of Scarce's

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[2] Consistent with the tenants of ethnographic studies, Scarce has developed personal relationships with some of his sources. Scarce does not claim any privilege regarding his personal relationships but asserts that his confidential research material is covered by a qualified privilege.

explicit promises of confidentiality made requisite to field interviews conducted in pursuit of his ethnographic research.

Two Show-Cause Hearings. Scarce was subpoenaed in May, 1992, but did not testify until November, 1992, at which time he was involuntarily immunized. Scarce testified in November, 1992, and early March, 1993, cooperating with the grand jury and responding to all questions regarding his personal acquaintances and professional activities except where the response required an actual breach of a confidential communication. At his first show cause hearing, held on February 19, 1993, Scarce offered to reveal the detailed factual basis for his claims of confidentiality *in camera.* The court declined, but stated that it would assume that Scarce's refusals were based upon actual promises of confentiality given in the pursuit of research data.[3] At his second show cause hearing, held April 6, 1993, Scarce re-asserted that he had a qualified privilege against compelled disclosure.

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[3] The district court stated that this element would be assumed for the purposes of argument. See Appendix at A4. Scarce asserted throughout his grand jury testimony that he was declining only to answer those questions that would require the disclosure of an actual confidential communication or the identity of his subject.

Functional Equivalent of a Journalist. The district court held that the witness was the functional equivalent of a journalist but that Scarce—no different than any journalist—had *no* privilege against compelled testimony. See Appendix, tab A2. The court specifically declined to apply a balancing test or to consider a qualified privilege for a non–percipient journalist/scholar to maintain the confidentiality of his sources. Appendix, tab A2

On March 2 and 3, 1993, the witness was again taken before the grand jury: Scarce refused to answer 32 questions calling for disclosure of confidential information.

On April 6, 1993, the witness was ordered by the grand jury foreman to answer the 32 questions: Scarce refused. The district court held its final hearing on the matter, permitting the ACLU to argue as amici. The court held Scarce in contempt. See Appendix, tab A3.

Scarce immediately appealed to the Ninth Circuit and was released from confinement pending review. Appendix at A3. Review was expedited pursuant to 28 U.S.C. § 1826.[4]

Ninth Circuit Affirmed on Expedited Appeal. On May 6, 1993, the Ninth Circuit issued a two-sentence decision,

[4] The statute is reprinted at page 2, above.

denying Scarce's appeal. No opinion accompanied the Ninth Circuit's order; nor has one issued to date. See Appendix, page A1.

Upon receipt of the decision, the district court ordered Scarce to be confined. Scarce has remained incarcerated since May 14, 1993.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW FAILS TO ACKNOWLEDGE THE BALANCING TEST REQUIRED BY A NON–PERCIPIENT WITNESS'S ASSERTION OF A QUALIFIED PRIVILEGE, IN CONFLICT WITH THE DECISIONS OF THE MAJORITY OF CIRCUITS [RULE 10.1(a)]

The following questions are presented:

1. Whether a non–percipient witness engaging in active scholarly research has a qualified privilege under the First Amendment against compelled disclosure of his confidential sources.

    a. Whether a research sociologist is functionally equivalent to a journalist for purposes of the speech–press clause of the First Amendment.

    b. If so, whether journalists/researchers who are not witnesses to the crimes under investigation have a qualified privilege to refuse disclosing their confidential sources.

2. Whether a non-percipient witness engaging in active scholarly research has a qualified privilege under the common law provisions of Federal Rules of Evidence 501 against compelled disclosure of his confidential sources.

Split Among the Circuit Courts. These issues have not been previously addressed by this Court. The only case closely touching upon the existence of a confidential–source privilege involved three reporters who were *percipient* witness. *Branzburg v. Hayes*, 408 U.S. 665 (1972) (pre-Rule 501). In

the intervening 21 years, the circuit courts have fashioned an array of conflicting interpretations of *Branzburg*: In the majority of circuits, a qualified confidential–source privilege for non-percipient journalist–witnesses is favored.[5] In other circuits, in particular in the Ninth, the privilege is denied any

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[5] E.g., *United States v. LaRouch*, 841 F.2d 1176 (1st Cir. 1988); *Baker v. F & F Investment*, 470 F.2d 778 (2nd Cir. 1972), *cert. denied*, 411 U.S. 966 (1973) (post–*Branzburg*); *United States v. Burke*, 7 Med. L. Rptr. 2019 (E.D.N.Y. 1981), *aff'd*, 700 F.2d 70 (2nd Cir.), *cert. denied*, 464 U.S. 816 (1983); *Riley v. City of Chester*, 612 F.2d 708 (3rd Cir. 1979) (three–part criteria for qualified privilege in civil case); *In re: Williams*, 766 F.Supp. 358 (W.D. Pa. 1991), *aff'd*, 936 F.2d 567 (1991) (applying *Riley* to grand jury); *United States v. Cuthbertson*, 630 F.2d 139 (3rd Cir. 1980), cert. denied, 449 U.S. 1126 (1981); *United States v. Steelhammer*, 561 F.2d 539 (4th Cir. 1977) (en banc: adopting Justice Powell's balancing test from his concurring opinion in *Branzburg*); *Miller v. Transamerican Press*, 621 F.2d 721 (5th Cir. 1980), *modified* 628 F.2d 932 (1980) *cert. denied*, 450 U.S. 1041 (1981); *but see, Storer Communications v. Giovan*, 13 Med. L. Rptr.. 2049 (6th Cir. 1987); *United States v. Calvert*, 523 F.2d 895, 902 n.4 (8th Cir. 1975), *cert. denied*, 424 U.S. 911 (1976); *Religious Technology Center v. Scott*, 13 Med. L. Rptr.. 1575 (C.D. Cal. 1986); *Silkwood v. Kerr–McGee Corp.* 563 F.2d 433 (10th Cir. 1977); *United States v. Blanton*, 730 F.2d 1425 (11th Cir. 1984); *Zerrilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981).

In all, ten circuits have ruled in favor of a balancing test for the reporter in a combination of civil and criminal cases. The scope and mechanism of the test, however, is different circuit–to–circuit. The Third Circuit has the most developed jurisprudence in favor of a qualified privilege. Nevertheless, no single analysis predominates, even within the circuits that have established the privilege.

validity.[6] Still others reach no definitive conclusion.[7] The lack of a clear standard has resulted in district courts—even within the same circuit—arbitrarily interpreting *Branzburg*. Compare, *Karem v. Priest*, 744 F.Supp. 136 (W.D. Texas 1990) (grand jury) with *Campbell v. Klevenhagen*, 760 F.Supp. 1206 (S.D. Texas 1991) (criminal trial). Numerous articles and commentaries have attempted to harmonize the disparate rulings. E.g., "The Newsperson's Privilege in Grand Jury Proceedings: An Argument for Uniform Recognition and Application", 75 J. Crim. L. & Criminology 413, 426–428 nn. 75, 76, 88, 90 (1984).

Scarce asserts that the *Branzburg* plurality and concurrence are traditionally understood to establish two views: Justice White's plurality decision, which declared that no privilege barred the identification of confidential sources; and Justice Powell's concurrence, which declared that the first

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[6] *In re: Lewis*, 501 F.2d 418 (9th Cir. 1974); *Lewis v. United States*, 517 F.2d 236 (9th Cir. 1975). In intrepreting the *Branzburg* opinions, the Ninth Circuit follows Justice White's plurality opinion and rejects Justice Powell's concurring opinion, resulting in the nation's most restrictive interpretation of *Branzburg*.

[7] See, *In re Grand Jury Subpoena Dated January 4, 1984 (Brajuha)*, 583 F.Supp 991 (E.D.N.Y.) (research sociologist claiming privilege), 750 F.2d 223 (2nd Cir. 1984) (reversing and remanding).

amendment does extend a limited privilege upon certain activities.[8] In all, five justices argued for at least a *qualified* privilege.

The universal interpretation among the circuits and lower courts holds that—for the percipient witness—there is no protection. *Branzburg*, 408 U.S. at 692 ("insofar as any reporter in these cases undertook not to reveal or testify *about the crime he witnessed*, his claim of privilege under the First Amendment presents no substantial question...") (emphasis added).

Non–percipient witnesses, on the other hand, have received the benefit of a qualified privilege in civil and criminal settings, including grand jury procedings.[9]

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[8] E.g., "Developments—Privileged Communications", 98 Harv. L. Rev. 1450, 1603–04 (1985) ("...[I]n the grand jury context, lower courts have used the restrictive language of Justice Powell's concurrence to require disclosure only if the information sought bears substantial relation to the grand jury investigation. The result has been the adoption of Justice Powell's approach: court shave created a qualified privilege employing case-by-case balancing to determine the applicability and extent of the privilege.")

But see In re: Lewis, 501 F.2d 418 (9th Cir. 1974), where the circuit court rejected a balancing approach. *Branzburg v. Hayes*, 408 U.S. at 710 (1972). In Scarce's appeal to the Ninth Circuit, the government's brief relied heavily on *Lewis* and ignored contrary authority from the majority of circuits.

[9] See note 5 above.

II. IMPORTANT QUESTIONS ABOUT THE SCOPE OF FEDERAL TESTIMONIAL PRIVILEGE UNDER THE FIRST AMENDMENT AND COMMON LAW NEED TO BE SETTLED BY THIS COURT [RULE 10.1(c)]

The starting point for any analysis of federal testimonial privilege begins with the Federal Rules of Evidence. Fed.R.Evid. 501 (reserving privileges that arise from constitutional, statutory, or common law sources)[10]; and Fed.R.Evid 1101(d)(2) (applying privilege rules to grand jury).

The rule specifically contemplates a case–by–case analysis. *Trammel v. United States*, 445 U.S. 40, 47 (1980); *United States v. Gillock*, 445 U.S. 360, 367 (1980); 1974 U.S. Code Cong. and Admin. News at 7082. The analysis requires a threshold determination before applying the facts to a particular witness: the court should "first decide whether a qualified privilege exists or should exist before deciding how

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[10] The cases cited in footnote 5, above, take varying approaches in finding the qualified privilege. The majority of cases are premised on a common law source, the balance cite to the First Amendment. There are statutory sources for an absolute privilege against compelled testimony in federally approved research, *see e.g.*, 45 C.F.R. Part 46, § 46.101(3)(4), -.111, -.116, "Protection of Human Subjects" and 42 C.F.R Subsection 2a.1–.8. The statutes' limited applications generally exclude newsreporters and social science researchers.

to apply it to a particular case." *In re Grand Jury (Granite Purchases*, 821 F.2d 946, 955 (3rd Cir. 1987), *cert. denied*, 108 S.Ct. 749 (1988); and see 8 J. Wigmore, § 2285 at 527 (McNaughton rev. 1961).

The lower courts have variously identified both the First Amendment and common law as sources for a qualified privilege. And while Congress has not passed legislation erecting a broad privilege for newsgatherers or researchers, dozens of states have done so, each with its own substantive and procedural requirements.

One state—Washington, where Scarce's grand jury sits—has found a purely common law source for a newsperson's privilege.[11] *Senear v. Daily Journal American*, 97 Wash.2d

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[11] The Ninth Circuit has held that state law may be considered in weighing the application of a federal–question privilege to a particular circumstance. *Lewis v. United States*, 517 F.2d 236, 237 (9th Cir. 1975) (post–Rule 501) (hereinafter "*Lewis II*"). Nevertheless, the federal court's decision, while considering state law, is not a gloss upon state law: it is manifestly *federal* law. *Lewis II* ("In determining the federal law of privilege in a federal question case, absent a controlling statute, a federal court may consider state privilege law... The rule ultimately adopted, whatever its substance, is not state law but federal common law.").

148, 641 P.2d 1180 (1982) (civil, common–law privilege)[12]; *State v. Rinaldo*, 102 Wn.2d 749, 689 P.2d 392, 395 (1984) (criminal, common–law privilege).

Qualifications Limiting the Privilege. There are limits, however, that circumscribe the application of the confidential–source privilege. Witnesses to criminal acts have been uniformly denied a "confidential source" privilege, and reporters accused of criminal conduct themselves are also denied any protection. *See, In re Grand Jury Matter (Gronowicz)*, 764 F.2d 983, 986 (3rd Cir. 1985) (distinguishing prior circuit cases that applied the privilege to investigations of the conduct of third parties).

Even where the privilege attaches, it may be overcome. *E.g., Senear*, 97 Wn.2d at 155 (when opposition to the privilege is not frivolous or brought for purpose of harassment, information sought was necessary or critical to the underlying cause of action, and the opponent made a

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12 Given both the complex and diffuse nature of modern society, the need for citizens in a representative democracy to make considered judgment, and the increasing importance of journalists to convey information to citizens, the confidential relationship is one which we feel 'in the opinion of the community ought to be sedulously fostered.' *Id.*, at 154 [citation omitted].

reasonably exhaustive effort to acquire the information first by non–privileged means). The third element, in particular, requires a detailed showing by the government.

> The values resident in the protection of the confidential sources of newsmen certainly point towards compelled disclosure from the newsman himself as normally the end, and not the beginning, of the inquiry.

Id., at 155. Scarce, by contrast, was denied any benefit of a balancing or least restrictive analysis, whether under First Amendment or common law principals.

Supreme Court Disposition Is Needed. Given the non–uniform application of the *Branzburg* concurrence, the lower courts cannot apply *Trammel's* case–by–case analysis with any consistency. The existence of a qualified privilege, its contours, and the weight to be accorded to the witness's claim as against the grand jury's legitimate interest in investigating federal crimes—all these factors turn less upon the facts of the case (per *Trammel*) than upon the geographic location of the witness.

Twenty–one years of experimentation by the circuits and states has produced a wide split among courts and commentators; the question of a qualified privilege for non-percipient journalists and research writers is now ripe.

CONCLUSION

For these reasons, James Richard Scarce submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 23rd, 1993

APPENDIX

DECISION BY THE NINTH CIRCUIT COURT OF APPEALS
filed without opinion MAY 6, 1993 ..... A1

MEMORANDUM DECISION BY THE DISTRICT COURT
filed FEBRUARY 22, 1993 ..... A2

ORDER OF CONTEMPT & RELEASE ON BAIL *filed*
APRIL 6, 1993 ..... A3

SELECTED PORTIONS OF THE RECORD A4

Request for In Camera Proffer
Transcript dated February 19, 1993

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IN RE GRAND JURY PROCEEDINGS	) No. 93-35333
	) DC# MAG 93-41 WFN
JAMES RICHARD SCARCE,	) Eastern-Washington
	) (Spokane)
Witness-Appellant,	)
vs.	) ORDER
	)
UNITED STATES OF AMERICA,	)
	)
Appellee.	)

Before: HUG, WIGGINS and THOMPSON, Circuit Judges

The district court's judgment, filed April 6, 1993, holding appellant in civil contempt for refusing to answer questions propounded by the grand jury is AFFIRMED. A written disposition will follow.

FILED: May 6, 1993

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

In Re:	)	MAGISTRATE NO. 93-0041A-01
	)	
JAMES RICHARD SCARCE,	)	ORDER
	)	
Respondent.	)	
	)	

A hearing was held in the above entitled matter on February 19, 1993 before the Honorable Wm. Fremming Nielsen. Appearing on behalf the government was Assistant United States Attorney Frank Wilson; appearing on behalf of Mr. Scarce was Jeffrey Finer. This Order is intended to memorialize the oral rulings of the court.

Mr. Scarce is a candidate for a Ph.D. degree in sociology at Washington State University. The government alleges that he has knowledge regarding a break-in that occurred at Washington State University resulting in research animals being lost and damage to property. The government seeks to compel him to testify before the Grand Jury. Mr. Scarce claims that if he does indeed have relevant information, he cannot be compelled to disclose it because of a researcher's privilege protected by the First Amendment's Freedom of Press clause. This hearing was requested to determine whether such a researcher's privilege exists and if it does, whether it would protect Mr. Scarce in this circumstance.

The seminal case in this area is *Branzburg v. Hayes*, 408 U.S. 665 (1972) wherein the Supreme Court held there is no reporter's privilege to refuse to give information to a Grand Jury. Mr. Scarce points out *Branzburg* is a plurality opinion and that in fact a majority consisting of the four dissenting judges and the concurrence of Judge Powell requires the government to make a showing that its interest in the

information out balances the reporter's First Amendment rights. *See id.* at 709-52. However, the Ninth Circuit has had an occasion to apply *Branzburg* in *In Re Lewis*, 501 F.2d 418 (9th Cir. 1974). In *Lewis*, a radio station manager was held "in contempt for refusing to produce a document and a tape recording pursuant to subpoena by the Grand Jury and for refusing to answer questions propounded by that body." *Id.* at 419. The court recognized that Mr. Lewis had a privilege to be free from official harassment but did not extend that privilege any further. The court found that the supplier of the document and tape had not requested they be kept confidential but "even had there been such, the lesson from *Branzburg, supra*, is that such a request, either explicit or implicit, may not override the authority of the Grand Jury." *Id.* at 423. As the Ninth Circuit in *Lewis* did not resort to the balancing test suggested by the *Branzburg* dissent, neither will this court.

Mr. Scarce also asserts that the Grand Jury subpoena impermissibly infringes upon his freedom of association. The court finds this argument to be without merit. Accordingly,

IT IS ORDERED that Mr. Scarce's request to quash the subpoena requiring him to testify before the Grand Jury on March 1, 1993, because of his scholar's privilege, be and the same is hereby **DENIED**.

IT IS S0 ORDERED. The Clerk is directed to enter this Order and forward copies to counsel.

DATED this 22 day of February, 1993.

/s/
WM. FREMMING NIELSEN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

In Re:	)	MAGISTRATE NO. 93-0041A-01
	)	
JAMES RICHARD SCARCE,	)	ORDER
	)	
Respondent.	)	
	)	

A hearing was held on April 6, 1993 before the Honorable Wm. Fremming Nielsen. Appearing on behalf of the government was Assistant United States Attorney Frank Wilson; appearing on behalf of Mr. Scarce was Jeffrey Finer; appearing as *amicus curiae* was Laurel Siddoway on behalf of the American Civil Liberties Union Foundation of Washington,

This Order is intended to memorialize the oral rulings of the court. Accordingly,

The court finds that Mr. Scarce has wrongfully refused to testify before the Grand Jury and is in contempt of court. It is **ORDERED** that Mr. Scarce is to be released on his own recognizance pending appeal of this order. Mr. Scarce is directed to not leave the Eastern District of Washington or Latah County, Idaho, without prior approval of his probation officer and notification to his attorney.

The Clerk is directed to enter this Order and forward copies to counsel.

DATED this 6 day of April, 1993.

/s/
WM. FREMMING NIELSEN
UNITED STATES DISTRICT JUDGE

are to protect the very disclosure that item three asks for and other things as well, the details of course, but the fact of a promise—which I do not want to establish from the stand, I want to establish in camera, if we are going to establish it at all—is one of the highly inculpatory items of evidence that Mr. Scarce, I argue today, has sworn not to reveal and this is the reason that I am happy to put him on the stand for generalities, but for the specifics, this is the reason we want to talk to you in chambers.

MR. WILSON: Your Honor --

MR. FINER: And if I may, one other thing to make this pertinent. Mr. Wilson has put a good deal of the weight of his brief on an assumption that there was some housing purpose to the visit that may have taken place on August 14th.

The thing we need to discuss with the Court—and that Mr. Scarce does not feel free to go into in any detail whatsoever—is the purpose of the meeting or the purpose of whatever conversations may have taken place and who was present and what was discussed and the whys and wherefores —I think the Court is entitled to know in order to make a fair ruling, but the evidence cannot come from this witness on the stand.

THE COURT: All right. *Let's just assume—let's just assume for the sake of our argument and without him having to testify, that he had conversations in August of 1991 in Pullman at his house or around there with certain individuals*

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and they gave him information and he promised as a sociologist that he isn't going to reveal the source of this information and he has in the back of his mind the reason for this code that we talked about. The sociologist's code [of ethics] I assume that are talking about. That is the basis for his—

MR. FINER: It is and we are free to assume it without stipulating to it so I am not creating some evidentiary point.

THE COURT: Now, you tell me why it is that the testimony he has given so far and add to that just the assumption that I just made, grows into a First Amendment privilege?

MR. FINER: All right. Fine. *If the Court is satisfied with the assumption on the record—*

THE COURT: *I think that is enough to determine whether or not legally there is a privilege and that is what you are trying to establish.*

MR. FINER: It is not clear to me, but I will accept your ruling on it. I would rather that the details be available to the Court because I think frankly they are compelling, but with the assumption given, I am willing to proceed.

THE COURT: Go ahead.

Emphasis added.

Supreme Court, U.S.
FILED
DEC 13 1993
OFFICE OF THE CLERK

No. 93-587

In the Supreme Court of the United States

OCTOBER TERM, 1993

JAMES RICHARD SCARCE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's challenge to an order holding him in contempt and incarcerating him for refusing to testify before a federal grand jury has been rendered moot by petitioner's release from custody.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 5 F.3d 397. The opinion of the district court denying petitioner's motion to quash the grand jury's subpoena (Pet. App. A2, at 1-2), the order of the district court finding petitioner in contempt and ordering him incarcerated (Pet. App. A3), and the order of the district court releasing petitioner from custody (App., *infra*, 1a-2a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 6, 1993. On August 3, 1993, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including August 24, 1993, and the

petition for a writ of certiorari was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. After receiving immunity pursuant to 18 U.S.C. 6002, petitioner was subpoenaed to appear before a grand jury in the Eastern District of Washington. The grand jury was investigating a break-in and vandalism, apparently by animal rights activists, at Washington State University. Petitioner, a Ph.D. candidate in sociology at the university who studies animal rights activists, moved to quash the subpoena, asserting that he could not be compelled to disclose the information sought by the grand jury based on a "scholar's privilege" protected by the First Amendment. Pet. App. A2, at 1-2; see *In re Grand Jury Proceedings*, 5 F.3d 397, 398-399 (9th Cir. 1993).

The district court denied the motion to quash. Pet. App. A2, at 1-2. The court held that petitioner had no privilege under the First Amendment to refuse to provide relevant testimony to the grand jury. *Ibid.* Petitioner then appeared before the grand jury and answered questions of a general nature, but he refused to answer questions relating to a conversation that he had one day after the break-in with Rodney Coronado, a suspect in the vandalism. 5 F.3d at 399.

On April 6, 1993, after hearing additional argument on petitioner's claim of privilege, the district court ordered petitioner to answer the grand jury's questions. Petitioner refused. The district court then found petitioner in contempt of court and ordered him incarcerated pursuant to 28 U.S.C. 1826. Pet.

App. A3; 5 F.3d at 399. The district court stayed its order pending appeal. Pet. App. A3.

2. The court of appeals affirmed the district court's finding of contempt in a summary order entered on May 6, 1993. Pet. App. A1. The order stated that "[a] written disposition will follow." *Ibid.* Petitioner was incarcerated on May 14, 1993. Pet. 8.

On September 17, 1993, the court of appeals issued a written opinion explaining its reasons for affirming the district court's incarceration order. The court assumed without deciding "that scholarly inquiry enjoys the same freedom of press protection that traditional news gathering does, and that [petitioner's] contact with his informants was incident to such work," but it nevertheless concluded that "the privilege to which [petitioner] lays claim by analogy simply does not exist." 5 F.3d at 399. The court noted that *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), held that "news gatherers are not exempt from the duty imposed on any other citizen to 'respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial.'" 5 F.3d at 400 (quoting *Branzburg*, 408 U.S. at 690-691).

The court of appeals concluded that "[t]he circumstances of the present case fall squarely within those of *Branzburg*." 5 F.3d at 400. The court found that petitioner had never argued that "the [grand jury] questions were posed in bad faith, that they had a tenuous relationship to the subject of the investigation, that law enforcement did not have a legitimate need for the information, or that they were posed as a means of harassment." *Ibid.* Accordingly, under *Branzburg*, petitioner had no First Amendment privilege to refuse to answer the grand jury's questions.

The court rejected petitioner's argument that, in view of Justice Powell's concurring opinion, *Branzburg* must be read to require a case-by-case balancing of the government's need for the information sought against the reporter's First Amendment interests. 5 F.3d at 400-402. The court explained that Justice White's opinion for the Court in *Branzburg* was joined by five Justices, including Justice Powell, and that it was therefore the opinion of the Court. Moreover, Justice Powell's concurring opinion "does not suggest that in each case there must be balancing of the particular information sought versus the newsman's request for confidentiality." *Id.* at 401. Accordingly, the court declined to accept petitioner's proposed balancing test, which "is at odds with the majority opinion [in *Branzburg*] itself." *Id.* at 400.

Finally, the court of appeals held that federal common law does not create a "scholar's privilege." 5 F.3d at 402-403. The court explained that recognition of such a privilege in the grand jury context would run afoul of *Branzburg*. The court distinguished the cases relied upon by petitioner, noting that "those cases did not involve grand jury inquiries," *id.* at 403, and that no court "that we have discovered * * * has actually recognized a scholar's privilege to withhold from a federal grand jury confidentially obtained information which is relevant to a legitimate grand jury inquiry and sought in good faith." *Ibid.*

3. On October 19, 1993, while the petition for a writ of certiorari was pending, the district court ordered petitioner released from confinement. The court found that "further incarceration is not likely to result in [petitioner's] giving testimony to the grand jury in response to the subpoena issued by the grand

jury and, for that reason, further incarceration would have no coercive effect and would therefore be punitive in nature." App., *infra*, 1a. The United States did not appeal from that order. Petitioner has now been released from custody.

ARGUMENT

Petitioner renews his claim (Pet. 9-16) that he had a First Amendment and federal common law privilege to refuse to answer the grand jury's questions regarding the break-in at Washington State University. Because petitioner has been released from custody, however, this case is moot.

1. "Article III of the Constitution limits federal courts to the adjudication of actual, ongoing controversies between litigants." *Deakins* v. *Monaghan*, 484 U.S. 193, 199 (1988); see *De Funis* v. *Odegaard*, 416 U.S. 312, 316 (1974) (per curiam). A case becomes moot if the court before which the matter is pending cannot grant any effective relief to the party seeking relief, see *Mills* v. *Green*, 159 U.S. 651, 653 (1895), or when the matter presents a "question[] that cannot affect the rights of litigants in the case" before the court. *De Funis*, 416 U.S. at 316. "It is not enough that a controversy existed at the time the complaint was filed." *Deakins* v. *Monaghan*, 484 U.S. at 199. "The parties must continue to have a '" personal stake in the outcome" ' " at all stages of a case. *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477-478 (1990).

Petitioner's appeal seeks relief from the district court's order under 28 U.S.C. 1826 incarcerating him for refusing to testify after being given immunity. Now that the district court has released petitioner,

he is no longer suffering incarceration for refusing to testify. The court's order therefore effectively lifts the finding of contempt and disposes of any need for relief from the contempt order. Accordingly, there is no longer an ongoing controversy between the parties, and the case is moot.

This is not a case that presents an issue "capable of repetition, yet evading review." See *Roe* v. *Wade*, 410 U.S. 113, 125 (1973); *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911). That exception to the mootness doctrine applies only where "there [is] a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975) (per curiam); see also *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 109 (1983). Petitioner has no reasonable expectation that he will again be incarcerated for failure to answer the grand jury's questions.

In ordering petitioner's release, the district court found that "further incarceration is not likely to result in [petitioner's] giving testimony to the grand jury." App., *infra*, 1a. There is no reason to believe that if petitioner were again subpoenaed before the grand jury, the district court would take a different view. Moreover, the Department of Justice has a policy of not resubpoenaing a grand jury witness who has been previously incarcerated for refusing to testify before the same or a prior grand jury on the same subject. See U.S. Attorneys' Manual § 9-11.160, at 14 (1988). Thus, petitioner is unlikely to face renewed incarceration for his refusal to testify.

2. Even if petitioner's claims were not moot, they would not warrant review. Petitioner contends (Pet. 9-16) that the First Amendment and federal common

law give researchers a qualified privilege to refuse to disclose information obtained from confidential sources. This Court held in *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), however, that journalists have the same obligation as other citizens to "respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial." 408 U.S. at 690-691. Although the Court acknowledged that "news gathering is not without its First Amendment protections," it made clear that journalists could refuse to respond to a grand jury subpoena only when a grand jury investigation is "instituted or conducted other than in good faith." *Id.* at 707; see also *id.* at 709-710 (Powell, J., concurring) (journalists may have a privilege to refuse to respond to a subpoena issued in bad faith). Petitioner makes no claim that the government is conducting the grand jury investigation in bad faith or that it seeks to harass petitioner by subpoenaing him to testify before the grand jury. Accordingly, petitioner had no right to refuse to answer the grand jury's questions, and the district court properly held him in contempt.

Petitioner errs in contending (Pet. 9-11 & n.5) that the decision below conflicts with cases holding that journalists have a qualified privilege under the First Amendment and federal common law to refuse to divulge information in criminal cases unless the party seeking the information shows that (1) the information sought is material and relevant; (2) the information cannot be obtained by other means; and (3) the party has a compelling interest in obtaining the information. See, *e.g.*, *La Rouche* v. *National Broadcasting Co.*, 780 F.2d 1134, 1139 (4th Cir.), cert. denied, 479 U.S. 818 (1986); *United States* v. *Burke*,

700 F.2d 70, 77 (2d Cir.), cert. denied, 464 U.S. 816 (1983); *United States* v. *Cuthbertson*, 630 F.2d 139, 146-147 (3d Cir. 1980), cert. denied, 454 U.S. 1056 (1981). None of the court of appeals decisions on which petitioner relies involved a journalist who was seeking to assert a qualified privilege in response to a grand jury subpoena.[1] As the court below recognized (5 F.3d at 400, 402-403), extension of those cases to the grand jury context would be squarely inconsistent with the holding in *Branzburg*. On the facts of this case, therefore, there is no conflict, and further review is not warranted.

Moreover, the government would prevail in this case even under the standard urged by petitioner. The grand jury sought to question petitioner regarding a conversation that he had with a principal suspect of a crime within a day of the commission of that crime. The questions posed to petitioner were highly relevant to the government's inquiry and bore a direct relationship to the subject of the investigation. Moreover, as the court of appeals stated, petitioner never argued "that the [grand jury's] questions were posed in bad faith, that they had a tenuous relationship to the subject of the investigation, that law enforcement did not have a legitimate need for the information, or that they were posed as a means of harassment." 5 F.3d at 400. Accordingly, even if

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[1] Petitioner erroneously identifies *In re Williams*, 963 F.2d 567 (3d Cir. 1992) (en banc), as a case in which a court of appeals recognized a reporter's privilege in the grand jury context. Pet. 10 n.5. That case has no precedential value, because the court of appeals did not issue an opinion but instead simply affirmed the judgment of the district court by an equally divided vote.

petitioner is correct that "scholars" enjoy a qualified privilege under federal common law or the First Amendment, petitioner has not presented a colorable claim that he is entitled to invoke that privilege.[2]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

JOSEPH DOUGLAS WILSON
Attorney

DECEMBER 1993

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[2] Because petitioner's claims on the merits are not worthy of review, the procedure applicable to cases that become moot while pending on appeal or in this Court (see *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-41 (1950)), is inapplicable, and certiorari should simply be denied. See 77-900 U.S. Br. in Opp. at 5-8, *Velsicol Chemical Corp.* v. *United States*, cert. denied, 435 U.S. 942 (1978); see also U.S. Br. as Amicus Curiae at 18 n.19, *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, No. 92-1123 (Nov. 30, 1993).

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Magistrate No. 93-0041A-01

IN RE: JAMES RICHARD SCARCE, RESPONDENT

[Filed Oct. 19, 1993]

ORDER

This matter is before the court on respondent's Motion to Vacate Contempt Order which has been taken under consideration by the court without hearing and without oral argument. The court having reviewed the documents on file and being thoroughly familiar with this matter finds as follows:

1. The respondent, James Richard Scarce, has been incarcerated in the Spokane County Jail since May 14, 1993 upon a finding of civil contempt for refusing to testify before a grand jury in this district.

2. It has become obvious to the court, and the court so finds, that further incarceration is not likely to result in the respondent giving testimony to the grand jury in response to the subpoena issued by the grand jury and, for that reason, further incarceration would have no coercive effect and would therefore be punitive in nature. *See* 28 U.S.C. § 1826 and *Simkin v. United States*, 715 F.2d 34 (2nd Cir. 1983). Now, therefore,

IT IS ORDERED that respondent's Motion for Release from Non-Coercive Confinement, Ct. Rec. 35, be and the same is hereby **GRANTED**. Respondent shall be released from incarceration immediately.

The Clerk is directed to file this Order, forward copies to counsel and forward a copy to the United States Marshal's Office for immediate action.

DATED this 19[th] day of October, 1993.

/s/ WM. FREMMING NIELSEN
UNITED STATES DISTRICT JUDGE